

(27,427)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 672.

JOHN HORSTMANN COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

No. 32004.

JOHN HORSTMANN COMPANY (a Corporation), Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

I. *Petition.*

Filed January 6, 1913.

To the Chief Justice and the Associate Justices of the Court of Claims:

The petition of John Horstmann Company respectfully shows:

I.

That it is, and during all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That petitioner is now, and was at all the times herein mentioned, the owner in fee simple, absolute and in possession, and entitled to the possession of that certain real property situate, lying and 2 being in the County of Churchill, State of Nevada, and particularly described as follows, to wit:

All of the Northeast quarter of Section 18, in Township 19 North Range 28, East, M. D. B. & M., according to the official plat of the survey of public lands made by the United States Surveyor General for the District of Nevada.

III.

That there was located on a portion of said lands of your petitioner, above described, and within the cone of an extinct volcanic crater, as hereinafter set forth, a small lake covering several acres, commonly known as and called "Little Soda Lake," also owned by your petitioner, which normally is nearly dry, except in small depressions as hereinafter more fully described; that said "Little Soda Lake" is within that certain district or area in the said State of Nevada called the "Fallon Area of the Carson-Truckee Irrigation Project," now in course of construction and about completed by the United States Government; that said "Little Soda Lake" lies in the extinct volcanic crater through which scoriated lava, cinders, flowing mud and ashes were ejected during its active state, forming a cone

upon a nearly level plane, as shown by line A B C on the profile attached hereto, marked Exhibit "A," and made a part hereof. This is part of what is generally termed the bed of Lake Lahonton. This cone, which forms the basin or sink of "Little Soda Lake" as well as "Big Soda Lake" which adjoins it, extends approximately four miles in length by two and one-half miles in width, as shown by line marked "Limit of Soda Lake Sand" as shown upon the map attached hereto, marked Exhibit "B," and made a part hereof; that the area embraced within the said cone is covered more or less by basalt or lava, the particles of which vary in size from four to six or eight inches in diameter to very fine sand at the outer rim of said cone; that said particles or fragments of basalt or lava decrease in size from the center of the said cone as they near the outer rim thereof until at the rim they consist of very fine sand, and this sand is constantly drifting about with the winds.

IV.

The bed of said Lake Lahonton is more or less sedimentary and lies in nearly parallel seams or strata of clay and sand through and along which the water from the irrigation canals and ditches, as hereinafter set forth, percolates and seeps and eventually finds its way to the lowest point, serving as an outlet to the said seams or strata of clay and sand, which said lowest point is the said "Little Soda Lake."

V.

That the soil in and about said "Little Soda Lake" and generally in and about that vicinity, is exceedingly porous and dry; that the normal annual rainfall in and about said district is slight, the mean annual precipitation amounting to about five inches, which is quite uniformly distributed over that period; that the rainfall in and about said area since the year 1905 down to the present time is and has been normal.

VI.

That the said "Little Soda Lake" is normally, and has been until the time and for the reasons hereinafter mentioned, a nearly dry stretch of land containing water only in small depressions; the water in one of such depressions being very saline, due to an alkali spring which arises in said depression. The water from this spring has a density which formerly and prior to the time and for the reasons hereinafter mentioned varied from 11 to 14 degrees Beaume, caused by the presence of salts therein; that during each year prior and up to the time and for the reasons hereinafter set forth, the water was pumped from said depressions where said spring arises, by your petitioner, into dry depressions or vats surrounding the said "Little Soda Lake" on the margin thereof, and was there evaporated by natural processes, leaving a thick and valuable deposit of impure sodium carbonate, which was then gathered by your petitioner.

VII.

That your petitioner acquired said real property above described in the year 1888, and has been ever since said time up to the time and for the reasons hereinafter mentioned, engaged in the commercial gathering and selling of sodium carbonate each year, after the water has evaporated from said vats or depressions surrounding said lake as above set forth, by means of scraping the same from the bottom of said vats or depressions.

VIII.

That your petitioner has at all times after the acquisition of said "Little Soda Lake" down to the time it was prevented from so doing, as hereinafter set forth, derived a large revenue and profit from the production and sale of said sodium carbonate, the amount of which annual income has been on the average during the past twenty years, the sum of \$1732.00 net over and above all expenses and costs.

IX.

That your petitioner has expended large sums of money, to wit, the sum of \$5000.00, in installing and building vats, sheds and other necessary facilities for the gathering and handling of said sodium carbonate.

X.

That said "Little Soda Lake" is valuable only and solely as a source of supply of said sodium carbonate and your petitioner purchased said property solely for that purpose, and at all times since it acquired the same it has used it solely for that purpose.

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XI.

That the said United States Government, by lawful authority through the Department of Interior and the Reclamation Service, in carrying out and in furtherance of, and while acting under the various acts of Congress of the United States for the irrigation and reclamation of arid lands in the United States, and particularly in the State of Nevada, did heretofore commence the building and construction of what is generally known as and called the "Carson-Truckee Irrigation Project" in the said State of Nevada; that in carrying out and as a part of said scheme of irrigation and reclamation of said arid lands in said State of Nevada, said United States Government, acting by and through said Departments of said Government, and the proper officers thereof, did build ditches, canals, flumes, aqueducts, pipes, gates, dams, and other useful and necessary appurtenances in said State of Nevada for the purpose of conducting, carrying and transporting water for the irrigation of said arid lands; that water is now and has been since the same was turned on in said ditches and canals, carried through said ditches and canals, flumes, aqueducts and pipes, and said irrigation system is now, and

has been, in so far at least as it affects the land of your petitioner, in full operation since about the month of December, 1906; that the irrigation season of said project in said State of Nevada, petitioner is informed and believes, lasts each year from about March 7 until October; that certain of said canals and ditches built as aforesaid by the United States Government, pass through across and over lands adjacent to the said "Little Soda Lake" and surround it on all sides at a distance of about one mile therefrom, as will appear in said Exhibit "B" hereto attached.

XII.

That none of said canals and ditches of said irrigation project for carrying, and which did carry said water, as aforesaid, and which surround said "Little Soda Lake," are lined by brick, cement, or other substance or material, but were made or constructed by merely digging out the earth, thereby forming a canal or ditch in the earth; that the water as it flows through the said canals or ditches seeps and percolates through the sides and bottom of said canals and ditches and through the adjoining soil to and into the said "Little Soda Lake," as the said "Little Soda Lake" is the lowest point and the point to which water would naturally flow underground from said canals and ditches by reason of the character of the seams or strata of the soil lying between the said canals and ditches and said "Little Soda Lake."

XIII.

That said United States Government and said departments and officers thereof, in carrying out said irrigation project as aforesaid, have brought into and continue each year to bring into said Fallon Area of said Project by and through its canals and ditches, large volumes of water from a great distance, to wit, from the Truckee River; that the said water was and is brought from outside of the watershed of the said Carson River, and particularly from outside of said Fallon Area of said Project, the result of which has been to add an amount of water annually to said Fallon Area largely in excess of the amount that is normally and was formerly brought into or contained in said area.

XIV.

That about the month of November or December, 1906, the exact time of which your petitioner does not know, and is therefore unable to state, the water was turned on in said canals and ditches surrounding the said "Little Soda Lake" by the United States Government acting through said departments and its proper officers thereof; that owing to the said porous condition of the soil in said canals and ditches, and generally in that vicinity as aforesaid, and the lack of proper lining in said canals and ditches, and owing to the way said canals and ditches were built, and also to the natural condition existing as aforesaid, by reason of which water would flow from said

canals and ditches to and into said "Little Soda Lake," the said water was permitted by the said United States Government
9 and the said departments and officers thereof, to and did seep
and percolate through the said canals and ditches and through the seams or strata of clay and sand underlying the same into and on the said "Little Soda Lake."

XV.

That immediately after the said water was turned into the said canals and ditches by said United States Government acting through said departments and officers thereof, the water therefrom commenced to and did percolate and seep through the said canals and ditches surrounding said "Little Soda Lake," and through the said seams or strata of earth leading therefrom to said "Little Soda Lake," and ever since has and does now continue to percolate and seep from the said canals and ditches into and on said "Little Soda Lake;" that the underground flow of water from said canals and ditches into said "Little Soda Lake" was not perceptible until some time in the early part of the year 1907, that is, about March of said year, when the water seeping and percolating from said canals and ditches was first noticed by your petitioner, but it was not then known or supposed by your petitioner, or was your petitioner in any way advised that such flow of water into said "Little Soda Lake" was caused by the seepage and percolation from said canals and ditches; that your petitioner was not then nor until some time afterwards aware of the fact that such underground flow of water

10 came from said canals and ditches; that no change in the condition of said "Little Soda Lake" was effected or caused until in the year 1907; that your petitioner at all of the times since the water was turned on in said canals and ditches kept and maintained an agent at said "Little Soda Lake" whose duty it was and who did report all matters and things concerning said "Little Soda Lake" to your petitioner; that from the year 1907 when the water was first noticed to be coming into said "Little Soda Lake" from said canals and ditches in the manner aforesaid, the same continued in said manner thereafter to come into said "Little Soda Lake" until the year 1908, when the said "Little Soda Lake" belonging to your petitioner did become and was wholly submerged, taken and appropriated by said United States Government, and thereby rendered unfit for the uses and purposes aforesaid and of no practical value whatever; that at the same time the said "Little Soda Lake" was so submerged, taken and appropriated, the said vats, sheds and other necessary facilities for gathering and handling said sodium carbonate were also taken and appropriated by said United States Government, and also thereby rendered unfit for the uses and purposes aforesaid and of no practical value whatever, solely by reason of the seeping and percolating of water into and on said "Little Soda Lake" as aforesaid; that the water from said canals and ditches has ever

11 since the year 1907 continued to percolate and seep in the manner aforesaid, into and on said "Little Soda Lake," and is now seeping and percolating into and on said "Little Soda

Lake," and will eventually entirely fill up said "Little Soda Lake" Basin.

XVI.

That solely by reason of the turning on and running of waters in said canals and ditches, and by reason of the said irrigation project and acts and things aforementioned, the said "Little Soda Lake" and the said vats, sheds, and other necessary facilities for gathering and handling sodium carbonate have been taken by said United States Government and said departments and officers, from your petitioner; and your petitioner since the year 1908 has been compelled to give up the gathering, handling and selling of said sodium carbonate from said "Little Soda Lake."

XVII.

That by reason of the foregoing your petitioner has a claim against the United States under an implied contract, for compensation for the value of property taken by the United States for a public use under the power of eminent domain under the Constitution of the United States and by authority of the Acts of Congress, duly empowering its officers and agents thereto in that behalf as aforesaid.

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XVIII.

That your petitioner wrote several letters to the Department of the Interior of the United States Government about two or three years prior to the present time, but the said department did disclaim and at all times has disclaimed any responsibility on the part of the United States Government for the said acts and things alleged herein, for the reason as such department claims, that the flow of water into and upon said "Little Soda Lake" was due to causes other than the flow of water into said canals and ditches surrounding your petitioner's lands; that your petitioner is the sole owner of said land and said "Little Soda Lake," and the only person interested in said lands or in this claim, or in any amount which may be recovered from the United States; that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made; that your petitioner is justly entitled to the amount herein claimed from the United States; that there are no credits or offsets to said claim; that claimant, your petitioner, has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said United States Government and that your petitioner believes all the facts stated in this petition to be true.

Wherefore, your petitioner prays that it have and recover from the said United States Government the sum of thirty-five thousand dollars (\$35,000), the same being the value of the said "Little Soda Lake" and the vats, sheds and other prop-

erty of your petitioner taken and appropriated by said United States Government.

And your petitioner will ever pray.

JOHN HORSTMANN COMPANY,
By JOHN HORSTMANN,

[CORPORATE SEAL.] *President.*
J. A. BERNHARD,
Secretary.

T. T. C. GREGORY,

THOMAS A. ALLAN,

San Francisco, California.

Attorneys for Petitioner.

EDWARD M. CLEARY,

Warder Building, Washington, D. C.

Of Counsel.

14 STATE OF CALIFORNIA,

City and County of San Francisco, ss:

J. A. Bernhard, being first duly sworn, deposes and says: That he is an officer, to wit, the secretary of John Horstmann Company, a corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters, that he believes it to be true.

That he makes this affidavit on behalf of John Horstmann Company, a corporation, for the reason that said facts are peculiarly within his knowledge, and for the further reason that said corporation cannot make an affidavit.

J. A. BERNHARD.

Subscribed and sworn to before me this 18th day of December, 1912.

[NOTARIAL SEAL.]

A. K. DAGGETT,
*Notary Public in and for the City
and County of San Francisco,
State of California.*

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II. *History of Proceedings.*

On March 21, 1913 the defendants filed a demurrer to the claimant's petition.

On May 26, 1913 the demurrer was argued and submitted by Mr. S. S. Ashbaugh, for the defendants, and by Mr. F. S. Bright, for the claimant.

On June 2, 1913, the demurrer was overruled by the court with an opinion by Barney, J.

III. *Argument and Submission of Case.*

On March 10, 1919 the case was argued by Messrs. Edward M. Cleary, Frank S. Bright and Stanley Hinrichs, for the claimant,

and by Mr. Karl E. Steinhauer, for defendants, in connection with the case of The Natron Soda Company, No. 32,453, and submitted.

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IV. *Findings of Fact and Conclusion of Law.*

Entered April 7, 1919.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation, duly organized and existing under the laws of the State of California, and its predecessors in interest were at the times herein mentioned the owners of certain lands in Churchill County, State of Nevada, surrounding and including a lake known as Little Soda Lake, which it owned in fee simple to wit: the North East Quarter of section 18, Township 19, North Range 19, East D. B. & M.

II.

Prior to and during the year 1906 the said lake and the lands surrounding it were in the actual possession of the plaintiff and its predecessors, who were manufacturing soda from the waters of said lake; this soda was marketed by the plaintiff, and this product so manufactured and marketed made the lake aforesaid valuable to the plaintiff.

A plant for the recovery of the mineral contents of the waters of Little Soda Lake had been constructed many years prior to the acquisition of the property by the plaintiff, and had been improved and added to by it, and was in full operation in the year 1906. Little Soda Lake was a dry lake bed with now and then water standing in pools forming sump holes which was pumped into earth vats along the edge of the lake and then manufactured into soda.

III.

Little Soda Lake is situated in an area known as the Carson Sink Valley, a depression in the earth's surface covering many thousand acres, which was during a past geologic age the bottom of an 17 inland sea, now called Lake Lahontan. The slope of said depression in the neighborhood of Little Soda Lake is in a general northeasterly direction with a grade of about ten feet to the mile. The detail of the topography within this depression has been modified by the elements since the desiccation of Lake Lahontan. These modifications consist of surficial deposits of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and some of them have in some places solidified into stone or become consolidated into compact and impervious areas of various sizes and shapes called playas. Fissures and cracks exist throughout the mass, the

occurrence of these various features or constituents not being uniform. The lowest depressions on the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Little Soda Lake was about 3,935 feet above sea level. The Carson River approaches within two miles of said lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

IV.

The Little Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the valley. This crater forms an inverted conical depression in the floor of said Lake Lahontan, with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

V.

The seasonal rainfall upon the valley floor averages about four inches, and is practically negligible as a source of ground-water replenishment. The bottom of said lake was below the level of the water table, and the only known source of water supply was the small springs which seeped into the lake. These springs were supplied by seepage from the Carson River.

Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground. The slope of the Carson Valley is in a northeasterly direction.

VI.

From prior to 1867 to 1906 the level of Little Soda Lake had not varied more than 2 feet.

VII.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson Project, consisting of dams, canals, and other structures whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal and N line canal and Truckee canal with their laterals. Each of said canals passes within two miles of Little Soda Lake except the Truckee

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canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year.

VIII.

With the advent of the Truckee-Carson irrigation project the body of ground water in the entire section covered by the project rose; the volume of water in Little Soda Lake has continually increased, and the level of said lake has risen about nineteen vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

IX.

From the time the Truckee-Carson Canal project was completed in 1906, to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation theretofore. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 100,000 acres.

X.

No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project.

XI.

The value of the property of the plaintiff which has been destroyed is \$9,000.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and therefore orders that the petition be, and the same is hereby, dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the chief clerk and collected by him according to law.

V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the Seventh day of April, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the John Horstmann Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimant, the John Horstmann Company, as aforesaid, the sum of Eight Hundred and Eighty-four Dollars and forty-six cents (\$884.45), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. Proceedings After Entry of Judgment.

On June 3, 1919 the claimant filed a motion for new trial and for amendment of findings of fact. On October 20, 1919 said motion was overruled by the court.

VII. Claimant's Application for, and Allowance of, an Appeal.

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this Court rendered on the 20th day of October, A. D., 1919, reaffirming a judgment rendered on the 7th day of April, A. D., 1919, by which the petition was dismissed.

EDW. M. CLEARY,
'Attorney for Claimant.

Filed Jan. 9, 1920.

Ordered: That said appeal be allowed as prayed for.

BY THE COURT.

Jan. 9, 1920.

JOHN HORSTMANN COMPANY (a Corporation),

vs.

THE UNITED STATES.

I, F. C. Kleinsehmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law entered

by the court; of the judgment of the court; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Washington City this January 14, 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 27,427. Court of Claims. Term No. 672. John Horstmann Company, appellant, vs. The United States. Filed January 14th, 1920. File No. 27,427.